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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1075.

THE UNITED STATES, *Petitioner*,

v.

ALBERT & HARRISON, INCORPORATED, *Respondent*.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

FOSTER WOOD,
Attorney for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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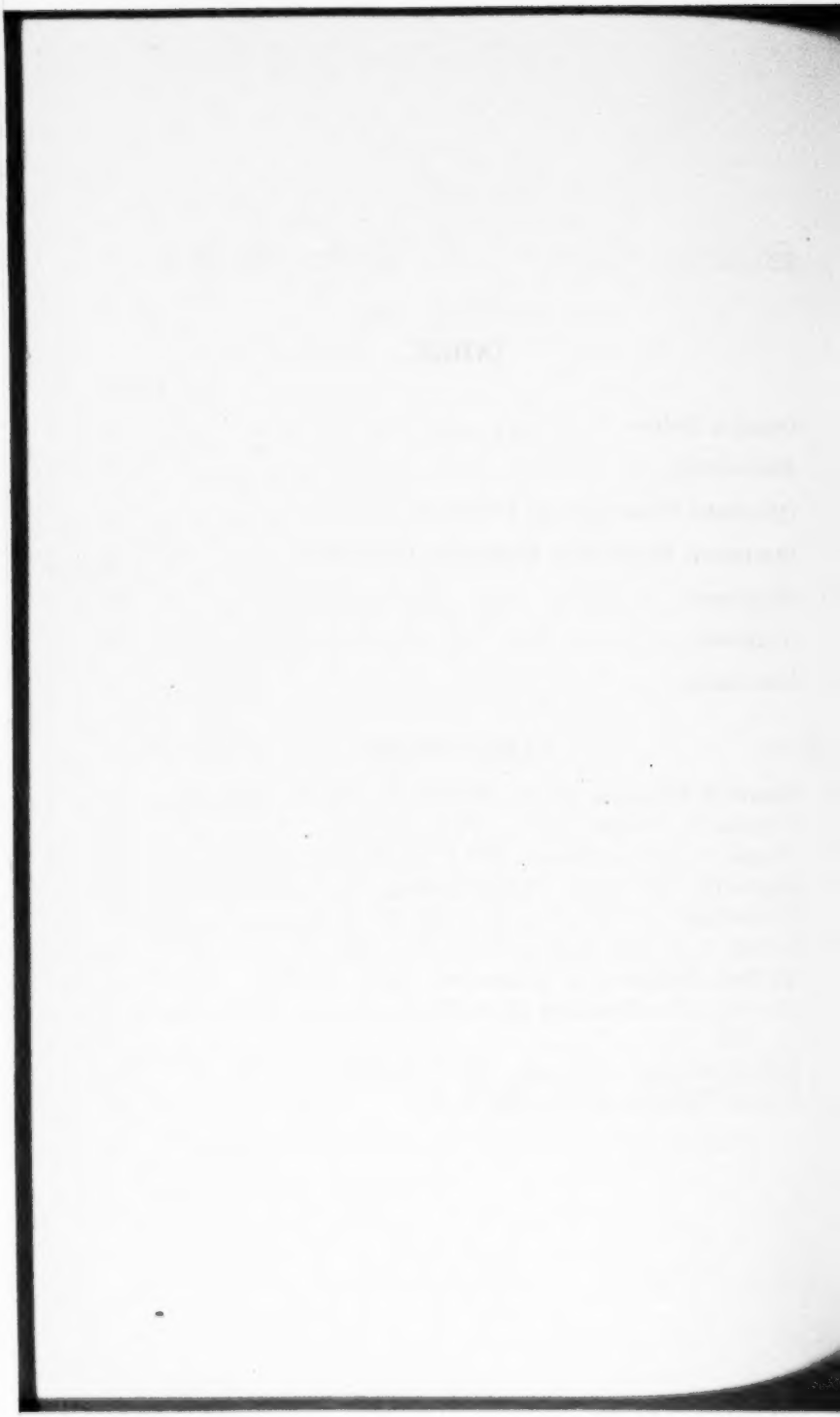

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OPINION BELOW.

The opinion of the Court of Claims (R. 18-21) is reported in 68 F. Supp. 732.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED BY PETITIONER.

1. Whether a bidder was coerced into entering into a Government contract where, after being informed of the award of the contract, he seeks to withdraw his bid as unduly low because of allegedly misleading drawings but nevertheless

signs the contract because of a threat to enforce the bid bond.

2. Whether, after signing the contract in the above circumstances and completing performance, the contractor may recover as extras certain work required by the contract.

STATEMENT RELATIVE TO QUESTIONS PRESENTED.

Respondent is of the opinion that the facts as found by the Court and the opinion of the Court do not justify question 2 as worded by petitioner. It is Respondent's contention that the work for which recovery was sought was an extra required to be performed under a revised drawing furnished the Contractor after the signing of the contract, and that this additional brick work was not called for or required under the original contract.

STATEMENT.

Invitations were issued to bid on the renovation of three one-story warehouses, 600 feet long, at Raritan Arsenal in New Jersey, accompanied by two drawings and specifications. The specifications called for the renovation of these buildings

> "* * * by the replacing of existing doors with brick, metal doors, and sash as indicated. * * *."

Drawing D-198, relating to building N-5, indicated all existing openings. Drawing D-197, relating to buildings M-4 and L-3 showed one large door in each of fourteen bays in each building. (Plaintiff's Exhibit 3)

On this drawing there appears an elevation marked "Typical Bay" indicating a bay with one large door. On each side of this door there appears the word "Brick" in very light letters, indicating that the existing wall is brick, nor is this area hatched in as is customary when showing new work. (R. 11)

This drawing indicated fourteen doors to be replaced with brick, metal doors and sash, in each of the two buildings, L-3 and M-4.

Respondent's did was based on these drawings.

When informed that its bid had been accepted, respondent's engineer who had prepared the bid, Mr. A. S. Harrison went to the arsenal to accept the contract.

Mr. Harrison noted a difference between buildings, L-3 and M-4 and the drawing of these buildings D-197, in that the buildings, contrary to the drawing, contained thirty-five doors in each east and west wall, there being five doors in each bay, rather than one as it appeared on the drawings.

Mr. Harrison called Colonel Kimble's attention to this discrepancy between the buildings and the drawing. Colonel Kimble informed Mr. Harrison that all of the openings were to be bricked up, whereupon Mr. Harrison stated that one hundred and sixteen of the openings did not appear on the drawings and had not been included in their estimate or bid and requested that new bids be called for. Colonel Kimble ordered plaintiff to proceed and stated if the contract was not signed, its bid bond would be forfeited. Mr. Harrison then went to New York and the following day returned with a Mr. Earl D. McClary, an engineer, and they called upon Colonel Woodberry, the contracting officer at the Arsenal, stating in substance what had been said the day before, but Colonel Woodberry also refused to permit them to withdraw. (R. 11)

Except for the fourteen doors shown on drawing D-197, covering buildings M-4 and L-4, neither the specifications nor drawings informed the contractor as to the number or location of the existing doors or openings to be removed. (R. 12)

The contract was then signed under protest to perform the work called for by the plans and specifications, and work was commenced. A day or two after the contract had been signed, the Contractor received from Captain Scott, the Officer in direct charge of the work, a revised drawing (Plaintiff's Exhibit 4), which indicated thirty-five doors in

the east and west walls of each building, or a total of one hundred and forty doors to be bricked up. This drawing also showed a "Typical Bay" in which there appear five openings. It also indicated a changed location of steam trench and of toilet room and changed the height of certain doors. (R. 13)

Contractor performed the brick work in accordance with the Revised plans and submitted its bill for bricking up the one hundred and twelve additional doors, as an extra.

ARGUMENT.

The decision of the Court of Claims is not unsound, nor does the decision conflict with the decision of the Court of Appeals for the District of Columbia, or with its own earlier decision.

Petitioner relies on the decision of the Court of Appeals for the District of Columbia in the case of *Board of Trustees, etc.* v. *O. D. Wilson Co.*, 133 F. (2d) 399; and the decision of the Court of Claims in *Massman Construction Co.* v. *United States*, 102 C. Cls. 699.

In each of these cases the Contractors, who sought to withdraw their bids, had erred in estimating the costs of the undertaking through mistakes of their own employees and the Government was in no respect at fault.

The Court of Claims in the present case, referring to the Massman case, said:

> "The situation is quite different from that in the Massman case, 102 C. Cls. 699. There the Government was in no way at fault or responsible for the plaintiff's mistake, and the plaintiff was probably not entitled to withdraw its bid. It was therefore, not improperly coercive for the agent of the Government to threaten to enforce the bid bond. Here the plaintiff's dilemma was the result of the Government's misleading documents." (R. 20)

In the other case cited by Petitioner, *Board of Trustees, etc.* v. *Wilson*, 133 F. (2d) 399, the Contractor sued the

School Trustees for the reasonable value of a floor installed in accordance with the plans and specifications, but which item the contractor's estimator had inadvertently omitted when preparing its bid. Upon discovery of the omission the Contractor sought to withdraw its bid and later sued for the value of this item. The District Court allowed it to recover for this work and the Court of Appeals, I think rightly, reversed the action of the trial court, and remanded the case to the lower court.

In the instant case not only did the United States, by the errors of its representatives, cause the losses complained of, but its representatives wrongfully denied being in error and threatened to penalize the contractor by the forfeiture of its bid bond, if it failed to sign the contract.

This Court in *Freund* v. *United States*, 260 U. S. 60, said:

> "We cannot ignore the suggestion of duress there was in the situation or the questionable fairness of the conduct of the Government, aside from the illegality of the construction of the contract insisted on. We think contractors are entitled to recover the reasonable value of their services, including a fair profit."

In *United States* v. *Smith*, 256 U. S. 11, the appellee had sued the United States for additional compensation because while excavating the bed of a river the contractor discovered a bed of limestone. The Government had represented that the material to be excavated consisted of clay, sand, gravel and boulders. Contractor's request for additional compensation was refused and contractor was told if it did not remove the bed of limestone it would be declared in default. This Court in its opinion said:

> "We concur, therefore, with the declaration of the Court of Claims, that the right of the appellees to recover the price of the work done by them is indisputable".

In *Hollerback* v. *United States*, 233 U. S. 165, this Court held that a loss resulting from a mistaken misrepresenta-

tion of an essential condition should fall upon the Government rather than upon the contractor, even though there are other provisions requiring contractor to make an independent investigation of the facts.

In *United States* v. *Gibbons,* 109 U. S. 200, this Court held the Government liable for increased costs to contractor where Government action necessitated building of additional walls by contractor.

> *Christee* v. *United States,* 237 U. S. 234;
> *Lowell* v. *United States,* 59 C. Cls. 494.

Hartsville Mill v. *United States,* 371 U. S. 43, cited by Petitioner, was distinguished from the present case when this Court referring to the Freund, Hunt and Smith cases hereinbefore cited said:

> "All were cases in which Government Contractors were called on to perform extra services, the representatives of the Government taking the position that the services demanded were stipulated for by the contracts."

In the present case the Contractor was required to perform extra brick work, the Government representative erroneously claiming that the work was called for by the plans and specifications.

The Court of Claims has found that this brick work was not called for by the plans and specifications and that it was an extra.

The submission of the Revised Drawing was an admission that this work had been omitted from the preceding drawing.

In *Moffett, Hodgkins and Clarke Co.* v. *Rochester,* 178 U. S. 373, city by Petitioner the plaintiff contractor had erred in its estimate and its bid having been accepted instituted suit again the City of Rochester, claiming the city had threatened to enforce its bid bond and praying for a reformation of the proposals to conform to asserted intention in making them, or their rescission and for injunction,

etc. Judgment was rendered for the Contractor by the Circuit Court and affirmed by this Court.

The Contractor, performed the brick work called for by the Revised Drawing and submitted its bill for this work as an extra, it not being work called for by the original plans and specifictions and the Court of Claims has found, that it is entitled to recover for this extra work.

Contractor wrongfully was placed in a dilemma as a result of the Government's misleading drawing. The increased costs were due to the Government's errors, not the contractors, and it should not be permitted to profit by its mistake.

The Government stated by its drawings you have fourteen doors in each building to brick up. When the contractor is about to sign the contract, it says you have seventy doors in each building to brick up, and if you don't sign this contract we will forfeit your bid bond.

Subsequent to the signing of the contract a Revised Drawing is handed to Contractor requiring additional work to be performed, including one hundred and twelve (112) additional doors to be bricked up. (R. 12)

The Government representatives were wrong when they failed to acknowledge their mistake and instead threatened the Contractor with a forfeiture of its bid bond if it did not sign the contract. The Revised Drawing was an acknowledgment of their error. Respondent performed the additional brick work specified in the Revised Drawing and should be paid for this work.

CONCLUSION.

For the reasons that have been stated above, it is submitted that the petition for a writ of certiorari to the United States Court of Claims should be denied.

Respectfully submitted,

FOSTER WOOD,
Attorney for Respondent.